No. 448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

HANCOCK TRUCK LINES, INC.,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

REPLY BRIEF

Of Appellee to the Brief of United States and Interstate Commerce Commission in Opposition to Appellee's Statement Against Jurisdiction and Motion to Dismiss or Affirm

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Appellee, Hancock Truck Lines, Inc., respectfully asks leave to file the following reply to the brief of the United States and the Interstate Commerce Commission in opposi-

tion to appellee's statement against jurisdiction, and motion to dismiss or affirm, to stress the following points:

One

Section 47, Title 28, U. S. C. A., sets up a complete procedure before a three Judge Court where the relief sought involves restraining, enjoining or suspending an order, in whole or in part; of the Interstate Commerce Commission; it very clearly provides for, as appellants admit, an appeal direct to the Supreme Court from an order granting or denying an interlocutory injunction, "if such appeal be taken within thirty days after the order" is made; immediately thereafter follows the provision of the statute for an appeal upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission and specifies that the same requirement as to Judges and the same procedure as to expedition and appeal shall apply.

We think the language of this Act, and the intent of Congress, are clear, and it is very definitely provided that such appeal from a final decision of a three Judge Court must be taken within thirty days from the date of the final judgment; to give the statute the meaning contended for by appellants is to wholly disregard, and read out of the statute, that part thereof which provides that "the same procedure as to expedition" shall apply: these words are in the statute and should be given their plain and ordinary meaning, which is that an appeal from a final judgment in such cases must be taken within the same time as appeals from interlocutory orders. If the contention of appellants is to prevail, then there are two statutory provisions relating to such appeals from final judgments, one,

under 47, providing that the appeal must be taken within thirty days, and two, under 47-a, where the appeal may be taken within sixty days; these statutes deserve no such incongruous construction; Section 47 provides the time for appeal in this case.

On page 10 of appellants' brief they refer to the case we cited of *Virginian Ry. v. United States*, 272 U. S. 658, 672, and say:

> "It appears, however, that all that the Court meant was that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time."

We do not think this is a correct application of the language used by the Court in the Virginian case; the Court was comparing the Urgent Deficiencies Act with Section 266 of the Judicial Code, which regulates proceedings before a three Judge Court in applications to enjoin or restrain the enforcement of state statutes; the Court said the two statutes were in pari materia, and that the two provisions originated in the same Act; it then further used the language set out on Page 11 of our jurisdictional statement; there can be no contention that the Court had in mind the ninety day statute for appeals when it said that Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of writs of injunction in cases of this character by the provisions which require action by three Judges, which permit of expediting hearings, and which shorten the period of appeal.

Two

On pages 8 and 9 of Appellants' brief it is argued that if appellee's contentions are correct, a very large proportion of the suits to set aside orders of the Commission have been improperly granted and numerous decisions of this Court have been made in appeals over which the Court had no jurisdiction. We submit that this is not a proper argument, nor a sufficient reason, for denying jurisdiction in this case. With proper respect, we feel that this Court should not take jurisdiction of this case simply because it has decided other cases of a similar nature where lack of jurisdiction was not properly brought to the Court's attention; while the Court has the right to, and does, examine the record to see whether it has jurisdiction, yet a subsequent litigant who presents a jurisdictional question should not be bound by former decisions involving similar cases where the jurisdictional question was neither presented nor fully argued.

Appellee has presented this question in the manner provided for by the rules of this Court, and is urging that this appeal is predicated upon a statute that has been repealed and has no application whatever herein.

Three

On page 9 of appellants' brief, they assert that the contention which we present herein was made in the case of *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.*, 319 U. S. 551; insofar as we are able to determine, there was no jurisdictional statement filed by the appellee in that case as required by Rule 12; a motion to dismiss or affirm was filed, which raised the question that the appeal had not been taken within thirty days; *it did not*

present the question that Section 47-a had been repealed; and if our position is correct, this Court has no power to consider this appeal on its merits, and appellee's motion to dismiss, or, in the alternative, to affirm, should be sustained.

Four

On page 11 of appellants' brief it is argued that Section 47 does not require that the petition for an appeal should be granted by a majority of the three Judge Court; we think it does so provide when it says that upon the final hearing the same requirement as to Judges and the same procedure as to expedition and appeal shall apply; this means that on the appeal a majority of the Judges must concur; they cannot act in any other manner; the requirement of a three Judge Court is not a mere privilege or right which the parties may waive; it is a jurisdictional requirement (*Riss & Co. v. Hoch et al.* (1938), 99 Fed. (2) 553 (10 C. C. A.)); the power and duties of such court do not terminate upon the rendition of a final judgment; when once properly created and assembled, the case "shall be heard and determined by three Judges"; this does not mean that one Judge can take over and act upon matters occurring subsequent to final judgment; the granting of an appeal, fixing bond, determining whether injunctive relief shall be granted pending the appeal, are not purely ministerial matters; they are matters involving a sound judicial discretion; it is a question of statutory power and jurisdiction; we do not understand that Rule 36 relates to appeals from a three Judge Court, as that Rule seems to relate to appeals from a District Court where a single Judge has the power to hear the case below, and to grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal; these

are matters which could certainly not be done by one member of a three-Judge Court; especially is this true in this appeal, where it is earnestly contended that the time for the appeal had expired before the petition had been presented; the three Judges should have passed on this question. We pointed out in our original statement that tion 3 of the Act of April 6, 1942, 28 U. S. Supp. III, 792, clearly related to such acts as might be reviewed by the three Judges at the final hearing, and of course this would not authorize one Judge to act alone on matters arising after final judgment. Appellants again urge on pages 12 and 13 of their brief that because other cases have been considered by the Court where the appeal was granted by a single Judge, therefore this one should also be decided; we think this argument begs the question and evades the issue; if the matter is jurisdictional, former decisions in similar cases cannot confer jurisdiction in this one.

We do not believe that either of these questions has been decided by this Court; we have presented them in the manner provided by the Rules of the Court; they affect the substantial rights of appellee, and we urge that the motion to dismiss, or, in the alternative, to affirm, should be sustained.

Respectfully submitted,

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